80-1809

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

JOHN P. GUZZARDO,

Petitioner

vs.

PAUL J. BENGSTON, Sheriff
of Winnebago County, Illinois,
and HONORABLE JOHN W. NIELSEN,
Judge, 17th Judicial Circuit,
Winnebago County, Illinois

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Was the accused denied his constitutional rights to confrontation and cross-examination of witnesses in his trial in the state court?

(2) Was the statute under which the defendant was convicted in state court unconstitutionally vague?

(3) Was the accused denied his right under the Sixth Amendment to effective assistance of counsel at trial?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

John P. Guzzardo, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Seventh Circuit, entered in the above-entitled case on March 13, 1981.

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Seventh Circuit is unreported and is set forth in Appendix A, infra.

The Opinion and Order of the United States District Court for the Northern District of Illinois, Western Division is also set forth in Appendix B, infra.

JURISDICTION

The Order of the United States Court of Appeals was filed on March 13, 1981, and this Petition for a Writ of

Certiorari is filed within sixty (60) days of that date, pursuant to Supreme Court Rule 20(1). The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI which provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; and to have the Assistance of Counsel for his defense."

United States Constitution, Amendment XIV which provides in pertinent part:

> "Section 1. Citizens of the United States.
>
> . . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISION INVOLVED

Chapter 38, Section 11-16(a)(2) Illinois Revised Statutes 1975 which provides in pertinent part:

> "(a) any person who performs any of the following acts for money commits pandering.
>
> (2) arranges or offers to arrange a situation in which a female may practice prostitution.

STATEMENT OF THE CASE

The appellant in this action, John P. Guzzardo, was charged by a single count information filed February 10, 1977, with the offense of pandering, contrary to Chapter 38, Section 11-16, Illinois Rev. Stats.

He entered a plea of not guilty, and the case proceeded to a jury trial in

the State of Illinois Circuit Court of the Seventeenth Judicial Circuit. The defendant was found guilty and was subsequently sentenced to a term of three years probation, with forty-five days confinement in the county jail on a work release program, and with a fine of $500.00 also imposed.

Defendant Guzzardo appealed his conviction to the Appellate Court of Illinois (Second District), which Court affirmed his conviction in a decision filed March 19, 1979.

Thereafter he filed a Petition for Leave to Appeal in the Supreme Court of Illinois from the affirmance of his conviction. This Petition was denied by the Illinois Supreme Court in an Order entered October 1, 1979.

On October 24, 1979, appellant filed a Petition pursuant to 28 USC 2254 for Writ of Habeas Corpus in the United States District Court for the Northern District of

Illinois (Western Division), alleging that he was denied his rights guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution in the state court prosecution.

The United States District Court denied the application for a Writ of Habeas Corpus in an opinion dated March 31, 1980. On April 7, 1980, appellant filed his Notice of Appeal to the Seventh Circuit Court of Appeals. Jurisdiction of the Court of Appeals was invoked pursuant to 28 USC 2253 and 28 USC 1294.

The Court of Appeals, in an opinion and Order dated March 13, 1981, affirmed the decision of the district court.

Petitioner filed, on March 27, 1981, a Petition for Rehearing with the Court of Appeals. That Petition was denied as untimely on March 31, 1981.

STATEMENT OF FACT

The relevant facts of this case begin on December 15, 1976, when two detectives of the Rockford City Police Department, Dale Gulbrantson and Jerry Bast, went to Iowa to return a Ms. Janet Virginia Roberts to Illinois to face a criminal charge. During the return trip Ms. Roberts made certain statements that caused Detective Gulbrantson to make an informal report to his department recommending that it investigate the possibility of prostitution going on at the "Naughty Lady Lounge", a Rockford drinking establishment owned by John Guzzardo and his brother, Lenny Guzzardo. (Trial Transcript, hereinafter "Tr.," 37-38).

As part of the ensuing investigation, Detective Robert Combs of the Rockford Police Department interviewed Ms. Lynn Wooten. (Tr. 50) During that interview he testified that he "took a statement from Miss Wooten, in regards to Mr. Guzzardo and

her, in regards to a conversation that they had in the past, reference to prostitution." (Tr. 50) Detective Combs then persuaded Ms. Wooten to go to the Naughty Lady Lounge with a radio transmitter concealed on her person. The police intended to record any conversation between Ms. Wooten and John Guzzardo. Ms. Wooten was then driven to the Naughty Lady Lounge, where she spent approximately twenty minutes. (Tr. 52-54) During that time she had a conversation with Guzzardo in which he allegedly agreed to provide her with a room in the Lincoln Hotel where she could practice prostitution. In exchange, appellant was to re-eive $5.00 for each of Ms. Wooten's customers. (Tr. 71-72) After leaving the Naughty Lady Lounge, Detective Combs took Ms. Wooten back to the Rockford Police Station, where she gave a written statement concerning this purported conversation with Guzzardo. (Tr. 54)

Although the conversation between Ms. Wooten and Guzzardo was supposedly recorded by the police, that alleged recording proved to be inaudible and, therefore, useless.

Appellant was arrested and charged with pandering (Ill. Rev. Stat. 1975, ch. 38, par. 11-16), and came to trial on June 28, 1977, before Judge John W. Nielsen. After the jury was impaneled the defense made a motion in limine to exclude the testimony of Detective Gulbrantson on the ground that his testimony would contain highly prejudicial hearsay and would concern matters irrelevant to the disputed issues of the case. (Tr. 10-26) During arguments on this motion the prosecution made an offer of proof which asserted that Detective Gulbrantson would testify that Ms. Roberts made certain unspecified statements that prompted the investigation of the activities going on at the Naughty Lady Lounge. The People's offer

of proof made no mention of the content of any of the conversations between the police and Ms. Roberts. (Tr. 14) More specifically, the offer of proof made no mention of prostitution.

The trial court denied the defense motion in limine to exclude the testimony of Detective Gulbrantson. It did, however, limit his testimony to the matters contained in the People's offer of proof, holding specifically that Gulbrantson could not testify to the substance of his conversation with Janet Roberts. (Tr. 24-26).

As its first witness the prosecution called Detective Gulbrantson. During his testimony the following colloquy took place between Detective Gulbrantson and Mr. Riggs, the Assistant State's Attorney, with respect to Gulbrantson's conversations with Roberts.

"MR. RIGGS: An informal report about what?

Detective Gulbrantson: About her conversations.

MR. RIGGS: What was the purpose in leaving that report?

*** (An objection which was overruled)

DETECTIVE GULBRANTSON: It was reference prostitution inside the building

MR. RIGGS: What was your purpose in leaving the report?

DETECTIVE GULBRANTSON: To be followed up on."

(Tr. 38, 39) (Emphasis added)

Immediately thereafter Guzzardo's trial counsel asked to be heard outside the presence of the jury. He moved for a mistrial on the ground that Detective Gulbrantson, by making references to prostitution, had exceeded the limits placed on his testimony by the trial court's earlier order. (Tr. 40) After brief arguments on the point, the trial court denied the motion but admonished the jury to disregard the witness's last statement. (Tr. 46)

The prosecution's next witness, Detective Robert Combs, testified as to how Ms. Wooten was wired for sound and then taken to the Naughty Lady Lounge on the night of January 20, 1977. (Tr. 49-56) Finally, the prosecution called Ms. Wooten, who testified that in her conversation with him John Guzzardo had agreed to provide her with a hotel room where she could practice prostitution, and that in exchange she was to pay him $5.00 per customer. (Tr. 71-72)

At the conclusion of Ms. Wooten's testimony, the prosecution rested.

The defense called only one witness at trial, David Hansen, one of Guzzardo's employees. Mr. Hansen testified that he saw Ms. Wooten at a party with Officers Richard Bast and Charles Bishop. (Tr. 116) The testimony was offered to impeach Ms. Wooten, who had testified that she had no previous contact with either man. (Tr. 84)

The jury found the petitioner guilty as charged. He was sentenced to three years probation, with 45 days to be spent in the county jail with work release privileges.

REASONS FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS DECIDED AN ISSUE IN A MANNER WHICH ABROGATES PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

Appellant contends that his conviction in state court was obtained in derogation of various constitutional rights. The specifics of this argument, and the authorities upon which it is based, follow.

I.

THE CONSTITUTIONAL RIGHTS OF PETITIONER WERE VIOLATED BECAUSE TESTIMONY WAS INTRODUCED IN DEROGATION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A fundamental right conferred upon an accused in criminal cases, under the Sixth Amendment, is the right to be confronted with the witnesses against him. This right guaranteed a defendant has been

made obligatory in the states by the Fourteenth Amendment. Pointer v. State of Texas, 380 U.S. 400 (1965).

It is clear, also, that a defendant's constitutional right to be confronted with the witnesses against him includes the right to cross-examine those witnesses. Pointer v. State of Texas, supra; Davis v. Alaska, 415 U.S. 308 (1974).

As the court stated in Pointer;

> "It cannot be seriously doubted at this late date that the right of cross-examination is included in the right of an accused to confront the witnesses against him. [M]r. Justice Stone, writing for the Court in Alford v. U.S., 282 U.S. 687, declared that the right of cross-examination is 'one of the safeguards essential to a fair trial.'" Id. at 404.

In the instant case, however, the right of crossexamination guaranteed by the Constitution was denied John Guzzardo at his trial by virtue of the nature of the testimony of Officer Gulbrantson. Gulbrantson's testimony was that he had spoken with a Janet Roberts, who told him that she knew

Lenny and John Guzzardo, and that she had been employed at their bar in Rockford. From the contents of other portions of her conversation, Gulbrantson testified that he had filed an informal report "reference prostitution inside the building."

The clear import of Gulbrantson's testimony is that he had spoken with Janet Roberts about the "Naughty Lady Lounge," owned by appellant, and that she had told Gulbrantson that prostitution was being carried on inside the building. Gulbrantson thus became a conduit for the hearsay statements of Roberts. Roberts was, in essense, a witness against Petitioner, John Guzzardo. Roberts herself, however, was not at trial and could not be cross-examined as to her statements previously made to Detective Gulbrantson.

Petitioner submits that because of his inability to cross-examine Roberts with respect to her highly prejudicial statements

to police, he was denied rights guaranteed him under the confrontation clause of the Sixth Amendment and the holdings of Pointer v. Texas, supra, and Davis v. Alaska, supra.

Once Gulbrantson's testimony relating the substance of his conversation with Roberts was heard by the jury, it became imperative for Guzzardo to be afforded the opportunity to cross-examine Roberts to ensure a fair trial. The absence of that opportunity, however, raised the clear danger that Guzzardo would be found guilty of violations alleged by Roberts and not of the charge pending before the Court.

Petitioner further asserts that because of the introduction of the substantive content of Roberts' conversations, without the opportunity to cross-examine her concerning those conversations, it became impossible for his trial to proceed in a fair and unbiased manner notwithstanding the Judge's limiting instruction to the jury. Therefore,

Guzzardo was denied his rights to due process of law under the Fifth and Fourteenth Amendments. As Mr. Justice Jackson wrote in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 453 (1949):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction . . ."

The language of the Court in Bruton v. U.S., 391 U.S. 123, 129 (1968), could not be more appropriate:

> " . . . the government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." (Citation omitted)

Further abrogation of appellant's right to confrontation and cross-examination of witnesses occurred at trial as a result of the content of the State's Attorney's opening statement to the jury. The State's Attorney stated as follows in those opening remarks:

> "Lynn Wooten then will testify regarding her knowledge of the defendant, John Guzzardo. She will tell you how long she has known him. She will tell you how many times she had occasion to be in his company. And she will tell you what has occurred as a result. She will make reference to an incident during the summer of 1976, where she, at the request of John Guzzardo, met him at the Lincoln Hotel on North Church Street in Rockford, Illinois, and received from him $20 to engage in an act of prostitution with a man at the - - and entered into an act of prostitution with a man at the Lincoln Hotel." (Tr. 29-30)

These comments were objected to by defense counsel, and the objection was not sustained by the Court, though the Court admonished the jury to not consider opening statements as evidence.

When the prosecution attempted to have Wooten so testify, the trial court upheld the defense objection that this was evidence of a prior bad act introduced to show a propensity to commit the offense charged. (Tr. 65)

Quite apart from the impropriety of the prosecution alluding to statements or incidents which he knew, or certainly should have known, would not be admissible at trial, the opening statement of the prosecutor resulted in a denial of Petitioner's right to confront witnesses. The prosecutor used his opening statement to convey prejudicial information to the jury. Petitioner, however, could not cross-examine Wooten concerning the alleged prior incident because her testimony concerning it was properly excluded. As the court in Bruton, supra, indicated, the Judge's limiting instruction is very likely ineffective in erasing the prejudicial effect upon the jury. Again, "the government should not have the windfall of having the jury influenced by evidence against a defendant which they should not consider but which they cannot put out of their minds." Bruton, 391 U.S. at 129.

II.

THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS UNCONSTITUTIONALLY VAGUE ON ITS FACE, THEREBY DEPRIVING PETITIONER OF DUE PROCESS OF LAWS MANDATED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Chapter 38, Section 11-16(a)(2), Illinois Revised Statutes 1975, under which petitioner was convicted, provides in pertinent part as follows:

> "(a) any person who performs any of the following acts for money commits pandering.
>
> (2) arranges or offers to arrange a situation in which a female may practice prostitution."

The vice complained of in the above statute should be judged against the standards set forth in Landry v. Baley, 280 F. Supp. 938, 951 N.D. Ill. 1968, as follows:

> "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute

> is so obscure that men of common intelligence must necessarily guess as to its meaning and differ as to its applicability, it is unconstitutional."

The constitutional mandate of specificity and certainty of a penal statute derives from the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. That due process requires this specificity has been recognized by the Supreme Court on numerous occasions.

> "Due process requires that all be informed by criminal statutes as to what the state commands or forbids and that men of common intelligence must not be forced to guess at the meaning of the criminal law." Smith v. Goguen, 415 U.S. 566 (1974), citing Lanzetta v. New Jersey, 306 U.S. 451 (1939), and Connally v. General Construction Co., 269 U.S. 385 (1926).

The statute at issue in the present case does not meet the criteria for specificity and definiteness of meeting as set forth in Landry and Smith, and hence the conviction of petitioner under that statute deprived him of his right to due process of law.

It is impossible to ascertain from the face of this statute what act may constitute

a violation of its provisions. There is no definition of the terms "arrange" or "offer to arrange" or "situation." All of these terms are extremely broad and susceptible to varying interpretations. It is completely unclear how many details of an arrangement must be discussed before becoming prohibited. It is unclear whether mere conversation concerning prostitution would be sufficient to convict, or whether some affirmative act in furtherance of a design to solicit must be alleged and proven. One cannot tell from a perusal of the statute whether the solicitation must be initiated by the person accused of the offense or whether it is sufficient that a person already practicing prostitution asks the accused to arrange a "situation" whether she may practice prostitution and the accused acquiesces. It is further unclear whether one of the necessary elements of the offense is that money be exchanged, or whether mere talk about money is sufficient.

All of the above interpretations of the statute are plausible, but there can be no certainty as to which interpretation is correct. In other words, one must guess at the meaning of this penal statute in contravention of the requirements of due process as set forth in Smith v. Goguen.

III.

APPELLANT WAS DENIED HIS RIGHTS UNDER THE SIXTH AMENDMENT IN THAT HE WAS AFFORDED INEFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment the accused in a criminal case shall enjoy the right to be represented by counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). This right to counsel imports that the assistance given by counsel shall be effective, otherwise the right is meaningless. McMann v. Richardson, 397 U.S. 759 (1970); Reece v. Georgia, 350 U.S. 85 (1955); Powell v. Alabama, 287 U.S. 45 (1932).

To meet the standard of effectiveness, counsel must meet the test set forth in Oritz v. Sielaff, 542 F.2d 377 1976), which is that counsel must meet "a minimum standard of professional responsibility."

Appellant submits that his trial counsel did not meet such a minimum standard of professional responsibility and that counsel was ineffective in petitioner's defense. This assertion is based upon a reading of the entire transcript, and includes, inter alia:

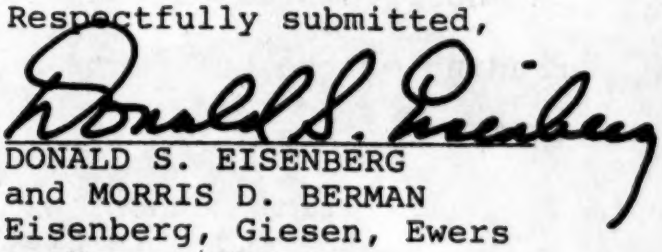
(1) Trial counsel's failure to request to voir dire State's witness Gulbrantson in order to determine what the State's Attorney had told him with respect to his testimony concerning Janet Roberts. Had Gulbrantson told him that he could not testify as to the substance of his conversation with Roberts, there would have been, arguably, grounds for a mistrial order. (R.38, 39)

(2) Trial counsel's failure to call Officer Bast. He would not have testified that he gave Wooten immunity as she testified. If that was the fact, the police officer would have had to, in effect, call the State's witness, Wooten, a liar.

(3) Trial counsel's failure to call petitioner to testify. Petitioner submits this failure goes beyond mere tactical error in the case at bar where a substantive defense could only come from petitioner's testimony.

(4) Trial counsel's failure to request and/or draft a jury instruction under which the jury would be told that they must scrutinize the testimony of an accomplice with greater care. Obviously the offense of pandering takes two people to commit the crime.

Respectfully submitted,



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A P P E N D I X

Opinion by Judge Campbell

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

March 13, 1981

Before

Hon. Robert A. Sprecher, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. William J. Campbell, Sr. Dist. Judge*

JOHN P. GUZZARDO,

Petitioner-Appellant,

No. 80-1696

v.

PAUL J. BENGSTON, SHERIFF OF WINNEBAGO COUNTY ILLINOIS, and HONORABLE JOHN W. NIELSEN, JUDGE, 17th JUDICIAL CIRCUIT, WINNEBAGO COUNTY, ILLINOIS,

Respondents-Appellees.

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*The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

No. 79-C-20092, Judge Stanley J. Roszkowski

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Western Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby affirmed, in accordance with the opinion of this Court filed this date.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 80-1696

JOHN P. GUZZARDO,

Petitioner-Appellant,

v.

PAUL J. BENGSTON, SHERIFF OF WINNEBAGO COUNTY, ILLINOIS, AND HONORABLE JOHN W. NIELSEN, JUDGE, 17TH JUDICIAL CIRCUIT, WINNEBAGO COUNTY, ILLINOIS,

Respondents.

Appeal from the United States District Court for the Northern District of Illinois, Western Division, No. 79C20092. Honorable Stanley J. Roszkowski, Judge.

Argued September 25, 1980

Decided March 13, 1981

Before Sprecher and Bauer, Circuit Judges, and Campbell, Senior District Judge.*

Campbell, Senior District Judge. John P. Guzzardo appeals from the District Court's entry of summary judgment on his petition for habeas corpus relief. Guzzardo's petition raised three Constitutional issues. He claims he was denied his right to confrontation under the Sixth and Fourteenth Amendments; that his trial counsel was so ineffective as to fall below the minimum standard of representation required under the Sixth Amendment; and that the statute upon which his conviction rests is unconstitutionally vague on its face. The District Court found petitioner's arguments meritless

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*The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

and entered summary judgment denying the writ. We affirm.

Petitioner was convicted of pandering, in violation of Illinois Rev. Stat. Ch. 38 §11-16 (1975). That statute provides that anyone who "arranges or offers to arrange a situation in which a person may practice prostitution" commits pandering, a Class 4 felony. Rockford Police first suspected petitioner when a Ms. Robbins, a prostitution suspect, made certain remarks suggesting that prostitution was ongoing at the "Naughty Lady Lounge", which was owned by petitioner. These remarks were made to Detective Gulbranson who filed a routine report of the conversation.

Shortly thereafter Rockford Police were interviewing a Ms. Wooten regarding prostitution activities in the area. She implicated petitioner in

organizing prostitution at a Rockford hotel. Police asked Wooten to meet with the petitioner at his bar and tape-record the conversation. Wooten agreed to do so. While the tape-recording proved inaudible, Wooten testified at trial that petitioner offered to provide her with a room at a local hotel to practice prostitution in return for a payment of $5.00 per customer.

Prior to trial, the trial court conducted a brief hearing to resolve certain evidentiary questions. The State sought to introduce Detective Gulbranson's testimony relating to his earlier conversation with Ms. Robbins regarding prostitution at the Naughty Lady Lounge. The Court permitted testimony solely on the fact that a conversation had taken place and a report filed, but not on the substance of the conversation.

At trial the following colloquy between the prosecutor and Gulbranson took place:

Question: An informal report about what?

Gulbranson: About her conversations.

Question: What was the purpose in leaving that report? (objection-overruled)

Gulbranson: It was reference [to] prostitution inside the building.

Question: What was your purpose in leaving the report?

Gulbranson: To be followed up on.

Defense counsel immediately moved for a mistrial, which was denied. The Court did, however, instruct the jury to disregard the remark about prostitution.

Petitioner contends that Gulbranson's remark was, in effect, a hearsay summary of what Robbins had told him about the Naughty Lady Lounge. Since Robbins was not a witness at trial, there was no opportunity for defense counsel to cross-examine her. That petitioner argues, is a denial of his Sixth Amendment right to confront the witnesses against him.

Errors in State trials arising out of the admission of hearsay statements are not grounds for Federal habeas relief absent a showing of deprivation of a specific due process right. U.S. ex rel. Serrano v. Smith, 394 F. Supp. 391 (D.C. N.&. 1975). In Pointer v. Texas, 380 U.S. 400 (1965), the Court held that the Sixth Amendment right to confrontation was a fundamental constitutional right, applicable to the states under the due process clause of the Fourteenth Amendment.

380 U.S. at 405. In Pointer the State introduced the transcript of a preliminary hearing into evidence. At that hearing the victim identified the defendant as the man who had robbed him. Pointer had not been represented by counsel at the hearing and made no attempt to cross-examine his accuser. The Court found that the introduction of the transcript denied Pointer of his right to confrontation and rendered the trial fundamentally unfair.

Petitioner relies on Pointer and Davis v. Alaska, 415 U.S. 308 (1974), in support of the claim of denial of his right to confrontation. In Davis the trial court entered a protective order which prevented defense counsel from questioning the prosecution's key witness about his prior criminal record on the same charge as the defendant, and about the witness' incentive to fabricate a story to protect himself and

gain favor with the police. The remark by Detective Gulbranson was hearsay and was not admissible evidence. Yet, it is hardly on the same level of prejudice as was found in Pointer or Davis. Even assuming the jury ignored the curative instruction and considered the remark, it would have only confirmed what could be reasonably inferred from Gulbranson's other testimony. Gulbranson testified that his conversation with Robbins prompted him to file a report for future investigation. Since there was direct evidence that petitioner was involved with prostitution, the jury could have reasonably inferred that Gulbranson's initial report made some form of reference to prostitution based on something said by Robbins. Petitioner was represented by counsel who was permitted to cross-examine Gulbranson regarding his reasons for filing his report. Due process does not require

that the defendant be afforded an opportunity to cross-examine every person about whom the jury might draw an inference which is adverse to the defendant. Gulbranson's hearsay remark was not so prejudicial as to render the trial fundamentally unfair.

Petitioner also asserts a denial of his right to confrontation resulting from the prosecutor's opening statement. In his opening remarks the prosecutor summarized what he expected the witness Wooten to say on direct examination. He told the jury:

> "[Ms.] Wooten then will testify regarding her knowledge of the defendant, John Guzzardo. She will tell you how long she has known him. She will tell you how many times she had occasion to be in his company. And, she will tell you what has occurred as a result. She will make reference to an incident during the summer of 1976, where she, at the request of John Guzzardo, met him at [a Rockford Hotel] . . . and received from him $20 to engage in an act of prosti-

> tution with a man at the -- and entered into an act of prostitution with a man at the . . . Hotel." (Tr. 29-30)

Petitioner's counsel objected to these comments, and the trial judge instructed the jury not to consider opening statements as evidence. When the State attempted to elicit this testimony from Ms. Wooten, defense counsel objected to the testimony on the grounds that it was evidence of prior bad acts indicating only a propensity to commit crimes. The trial judge sustained the objection and did not permit further inquiry into the prior incident.

Petitioner claims that his right to confrontation was denied as a result of his counsel's inability to cross-examine Ms. Wooten about her earlier contact with petitioner. The jury knew about the incident due to the prosecutor's opening remark, yet defense counsel was unable to cross-examine Ms. Wooten regarding the

incident as a result of the Court's evidentiary ruling during direct examination. Petitioner does not claim prosecutorial misconduct. Petitioner's argument on this point hinges entirely on the confrontation clause as an ingredient of due process.

In analyzing State Court proceedings by way of §2254 review, Federal Courts must distinguish between that error which is so prejudicial as to deny the petitioner fundamental due process of law, and that which does not. See Bruton v. United States, 391 U.S. 123, 135 (1968). The instant case falls into the latter category. The jury was instructed that it was to consider only the evidence introduced at trial, and that the remarks of counsel were not evidence. In Frazier v. Cupp, 394 U.S. 731 (1969), the Court held that a similar summary of evidence in the State's opening

statement did not so prejudice the jury as to deny petitioner a fair trial even when the State failed to elicit the summarized testimony during the course of the trial. Mr. Justice Marshall noted:

> ". . . here we have no more than an objective summary of evidence which the prosecutor reasonably expected to produce. Many things might happen during the course of the trial which would prevent the presentation of all evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given. 394 U.S. at 736.

While a remark during an opening statement could be so prejudicial as to taint the entire trial, this is not such a case. The prosecutor's inaccurate summary of Ms. Wooten's testimony does not warrant federal habeas relief.

Petitioner next attacks the Illinois pandering statute as unconstitu-

tionally vague on its face. He contends that due process requires greater specificity as to what the law forbids than this statute affords. Petitioner relies on Smith v. Goguen, 415 U.S. 566, in which the Court reversed a conviction based on a Massachusetts statute which prohibited "treating contemptuously the Flag of the United States." In that case the defendant was convicted of violating the statute for wearing a small cloth flag sewn to the seat of his trousers. In reversing the conviction on vagueness grounds the Court noted that a greater degree of specificity is required when First Amendment rights are affected. 415 U.S. at 572-73. See also Spence v. Washington, 418 U.S. 405 (1974).

The Illinois pandering statute does not infringe on the exercise of one's freedom of expression. Thus, all that the statute need do is provide fair notice to

a person of ordinary intelligence that his contemplated conduct is forbidden. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The doctrine of vagueness is based on the notion of fairness. No man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Colton v. Kentucky, 407 U.S. 104, 110 (1972).

The language of the Illinois pandering statute gives a person of ordinary intelligence adequate notice as to what conduct the statute proscribes. The term "arrange a situation in which a female may practice prostitution" evokes a rather clear image of what the legislature had in mind when the statute was enacted. Petitioner's vagueness challenge is without merit.

Petitioner's final contention is that he was denied effective assistance of counsel. This argument centers on four alleged omissions by petitioner's trial counsel: (1) failure to voir-dire Detective Gulbranson; (2) failure to call Officer Bart to the stand to impeach Ms. Wooten's testimony as to her immunity from prosecution; (3) the failure to request alternative instructions to the jury as to the weight and credibility of the testimony of an accomplice; and (4) the failure to call petitioner as a witness in his own defense.

The State argues that petitioner has waived the right to pursue this issue in the Federal Courts by failing to present the issue on direct appeal in the State courts. Under Ill. Rev. Stat., Ch. 38 §122-1 et seq. (1979), allegations of incompetent counsel based on the record

must be raised on appeal or are deemed res judicata in subsequent Illinois post-conviction proceedings. Francis v. Henderson, 425 U.S. 536, and Wainwright v. Sykes, 433 U.S. 72 (1977), require a habeas petitioner who bypasses state procedural rules to show cause why he did so and prejudice resulting from that deliberate bypass. Francis v. Henderson involved a State contemporaneous objection rule which the petitioner in that case failed to observe. In Wainwright v. Sykes, 433 U.S. 72 (1977), the Court extended the Francis holding to the failure to object to the admission of a confession at trial. In order to attack the admission of the confession on habeas review, the petitioner was required to meet the cause and prejudice test.

The procedural bar raised by the State in the instant case is different from

the contemporaneous objection requirements asserted in Francis and Sykes. An ineffective assistance of counsel claims is by its very nature a post-trial assertion. It can be argued that a State's rule governing post-trial procedures is entitled to the same deference by Federal Courts as a State contemporaneous objection rule. Nevertheless, such a holding would clearly be an extension of Francis and Sykes which we decline to undertake in this case. We believe the District Court correctly decided the ineffective assistance of counsel claim on the merits and we prefer to resolve petitioner's contention on the merits as well.

A petitioner asserting a lack of effective assistance of counsel in a criminal case must prove that his counsel's performance did not meet a minimum standard of professional representation. U.S. ex

rel. Ortiz v. Sielaff, 542 F. 2d 377, 379 (7th Cir. 1976). The points raised by petitioner as evidence of ineffective representation reflect speculation and hindsight as to how petitioner's defense might have been improved. The voir dire of Detective Gulbranson might have revealed that the prosecutor had informed the witness as to the limited scope of his direct examination. Petitioner apparently believes that would have laid a foundation for a mistrial when Gulbranson testified that prostitution was the subject of his initial report. Such reasoning can only be characterized as speculation as to what might have happened if a number of variables had occurred. The failure to request the voir dire is not ineffective representation.

The remaining omissions raised by petitioner relate to tactical trial

decisions, the wisdom of which we can only speculate on. Calling the petitioner as a witness could, for example, have proven to be a grave error on cross-examination. A minimum standard of professional representation does not mean representation free of questionable tactical decisions or even what hindsight might suggest were mistakes. It means representation without serious prejudicial blunders which have foreseeable adverse consequences. Implicit in the Sixth Amendment right to counsel in criminal cases is the notion of adequacy.

Our reading of the record reveals representation which was certainly adequate. Petitioner's trial counsel aggressively defended his client and provided competent legal representation.

For these reasons we conclude the District Court's entry of summary judgment

denying habeas corpus relief should be affirmed.

AFFIRMED.

A true Copy:

Teste: _____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

NAME OF PRESIDING JUDGE, HONORABLE STANLEY J. ROSZKOWSKI

CAUSE NO. 79-C-20092 Date:

Title of Cause: JOHN P. GUZZARDO vs. PAUL J. BENGSTON, et al.

Brief Statement of Motion: ORDER

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel:

_____

_____

_____

Representing: _____

_____

_____

Names and addresses of other counsel entitled to notice and names of parties they represent. _____

_____

_____

_____

Reserve space below for notations by minute clerk: _____

Respondents' motion for summary judgment is granted. (DRAFT).

_____

Hand this memorandum to the Clerk. Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

WESTERN DIVISION

No. 79 C 20092

JOHN P. GUZZARDO,

Petitioner,

vs.

PAUL J. BENGSTON, Sheriff of Winnebago County, Illinois, and HONORABLE JOHN W. NEILSEN, Judge, 17th Judicial Circuit, Winnebago County, Illinois,

Respondents.

ORDER

This matter is before the court on respondents' motion for summary judgment on petitioner's application for a writ of habeas corpus brought pursuant to 28 U.S.C. §2254. For the reasons hereinafter stated, respondents' motion shall be granted.

There is no dispute as to the facts of this cause. On December 15, 1976, two detectives of the Rockford City Police Department, Dale Gulbrantson and Jerry Bast, went to Iowa to return a Ms. Janet Virginia Roberts to Illinois to face a criminal charge. During the return trip, Ms. Roberts made certain statements that caused Detective Gulbrantson to make an informal report to his department recommending that it investigate the possibility of prostitution going on at the Naughty Lady Lounge, a Rockford drinking establishment, owned by the petitioner and his brother, Lenny Guzzardo.

As part of the ensuing investigation, Detective Robert Combs, of the Rockford City Police Department, interviewed Ms. Lynn Wooten. During that interview on January 20, 1977, Ms. Wooten gave a written statement to the effect that

on a previous occasion, approximately six months earlier, the petitioner had given her twenty dollars ($20.00) to perform an act of prostitution with another man. Detective Combs then persuaded Ms. Wooten to go to the Naughty Lady Lounge with a radio transmitter concealed on her person. The police intended to record any conversation between Ms. Wooten and petitioner.

Ms. Wooten was driven to the Naughty Lady Lounge where she spent approximately twenty minutes. During that time she had a conversation with petitioner in which he allegedly agreed to provide her with a room in the Lincoln Hotel where she could practice prostitution. In exchange, petitioner was to receive five dollars ($5.00) for each of Ms. Wooten's customers. After leaving the Naughty Lady Lounge, Detective Combs took Ms. Wooten back to the Rockford Police Station where

she gave a written statement concerning her conversation with petitioner.

Although the conversation between Ms. Wooten and petitioner was supposedly recorded by the police, that recording proved to be inaudible and, therefore, useless.

Petitioner was arrested and charged with pandering. (Ill. Rev. Stat. (1975), ch. 38, ¶11-16). He came to trial on June 28, 1977, before Judge John W. Nielsen. After the jury was impaneled, petitioner made a motion in limine to exclude the testimony of Detective Gulbrantson on the ground that his testimony would contain highly prejudicial hearsay and would concern matters remote and irrelevant to the triable issues of the case.

During arguments on the motion in limine, the People made an offer of

proof that asserted that Detective Gulbrantson would testify that Ms. Roberts made certain statements that prompted the investigation of the activities going on at the Naughty Lady Lounge. The People's offer of proof made no mention of the content of any of the conversations between the police and Ms. Roberts. More specifically, the offer of proof made no mention of prostitution. While the trial court denied petitioner's motion in limine to exclude the testimony of Detective Gulbrantson, it did limit his testimony to the matters contained in the People's offer of proof.

During his opening statement, Bradner C. Riggs, the Assistant State's Attorney, asserted that Ms. Wooten would testify that on a prior occasion petitioner had paid her twenty dollars to perform an act of prostitution with another man.

Petitioner objected. While the trial court did not rule on the objection, it did inform the jury that opening statements are not evidence and that it was up to the jury to decide whether or not a party had proved all the assertions he made during his opening statement.

As its first witness, the People called Detective Gulbrantson. During his testimony, the following colloquy took place between Detective Gulbrantson and Mr. Riggs, the Assistant State's Attorney:

Question: An informal report about what?

Answer: About her conversation.

Question: What was the purpose in leaving that report?

***(An objection which was overruled)

Answer: It was reference prostitution inside the building.

Question: What was your purpose in leaving the report?

Answer: To be followed up on.

Immediately thereafter petitioner asked to be heard outside the presence of the jury. He moved for a mistrial on the ground that Detective Gulbrantson, by making references to prostitution, had exceeded the limits placed on his testimony by the trial court's earlier order. After brief arguments on the point, the trial court denied the motion but admonished the jury to disregard the witness' last statement.

The People's next witness, Detective Robert Combs, testified that Ms. Wooten was wired for sound and then taken to the Naughty Lady Lounge on the night of January 20, 1977. Finally, the People called Ms. Wooten, who testified that petitioner agreed to provide her with a

hotel room where she could practice prostitution and, in exchange, she was to pay him five dollars per customer.

At the conclusion of Ms. Wooten's testimony, the People rested.

Petitioner called only one witness at trial, David Hansen, an employee of petitioner. Mr. Hansen testified that he saw Ms. Wooten at a party with Officers Richard Bast and Charles Bishop. The testimony was offered to impeach Ms. Wooten, who had testified that she had no previous contact with either man.

The jury found petitioner guilty as charged. He was sentenced to three years probation with 45 days to be spent in the county jail with work release privileges.

Petitioner appealed his conviction to the Appellate Court of Illinois, Second District. The lower

court's decision was affirmed. Subsequently, petitioner filed a petition for leave to appeal to the Supreme Court of Illinois from the affirmance of his conviction. The petition for leave to appeal was denied by the Supreme Court on October 1, 1979.

Petitioner filed a petition for a writ of habeas corpus in this court on October 24, 1979, alleging: (1) that the statute under which he was convicted (Ill. Rev. Stat. (1975), ch. 38. ¶11-16(a)(2)) is unconstitutionally vague; (2) that he was denied his rights under the Sixth Amendment in that he was afforded ineffective assistance of counsel; (3) that his Fourteenth Amendment rights to due process of law were violated by prosecutorial impropriety during the prosecutor's opening statement to the jury; and (4) that the trial court violated his Sixth

Amendment right to confrontation of witnesses by allowing hearsay and other evidence at trial.

On November 9, 1979, respondents filed a motion for summary judgment pursuant to Rule 56(b), Federal Rules of Civil Procedure.

Petitioner's first contention, that the statute under which he was convicted is unconstitutionally vague, is without merit. The relevant portion of the statute reads as follows:

> (a) Any person who performs any of the following acts for money commits pandering:
>
> (1) * * *
>
> (2) Arranges or offers to arrange a situation in which a female may practice prostitution.
>
> (Ill. Rev. Stat. (1975), ch. 38, ¶11-16(a)(a)).

Although the Constitution has erected procedural safeguards to protect against conviction for crimes that have not been clearly defined, "the Constitution does not require impossible standards." United States v. Petrillo, 332 U.S. 1, 7 (1947). "All that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Roth v. United States, 354 U.S. 476, 491 (1957).

Petitioner argues that the langugae of the statute in question is not "sufficiently focused to forewarn of both its reach and coverage," a standard set by the United States Supreme Court in United States v. National Dairy Products Corp., 372 U.S. 29 (1963). That case, which involved the question whether §3 of the Robinson-Patman Act, 15 U.S.C. §13(a), was

unconstitutionally vague with respect to certain sales made below cost, also stated:

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. [citation omitted]. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

372 U.S. at 32-33.

The court agrees with the holding of the Appellate Court of Illinois in this case that petitioner's conduct, offering in exchange for money to provide a hotel room where Ms. Wooten could practice prostitution, is clearly the type of conduct the statute seeks to prohibit. Accordingly, the court holds that the statute in question, Sec. 11-16(a)(2) of the Illinois Criminal Code (Ill. Rev. Stat. (1975), ch. 38, ¶11-16(a)(2)), is not unconstitutionally vague.

Petitioner's second contention is that he was denied his rights under the Sixth Amendment in that he was afforded ineffective assistance of counsel. Respondents argue that petitioner has waived the right to present this issue here because he made a deliberate tactical decision to forego the claim in the state courts. Respondent has not convinced the court, however, that any such tactical decisions were involved in this case. Absent such a showing, failure to raise an issue in state courts will not bar its consideration by a federal court in habeas corpus proceedings. Fay v. Noia, 372 U.S. 391 (1963); United States ex rel, Williams v. Brantley, 502 F. 2d 1383 (7th Cir. 1974). The court thus proceeds to examine the merits of petitioner's claim.

Petitioner contends that his counsel did not meet the "minimum standard

of professional representation" required by United States ex rel. Williams v. Twomey, 510 F. 2d 634 (7th Cir. 1975). Specifically, petitioner cites four instances of failure on the part of his trial counsel: (1) failure to request to voir dire State's witness Gulbrantson in order to determine what the State's Attorney had told him with respect to his testimony concerning Janet Roberts; (2) failure to call Officer Bast to testify; (3) failure to call petitioner to testify; and (4) failure to request a jury instruction to the effect that the testimony of an accomplice should be scrutinized with greater care.

Whenever called upon to consider a charge that counsel has failed to discharge his professional responsibilities, the court starts with a presumption that counsel was conscious of his duties to his client and sought conscientiously to dis-

charge those duties. The burden of demonstrating the contrary is on the former client. Matthews v. United States, 518 F. 2d 1245 (7th Cir. 1975).

After careful consideration of the record in this case, the court finds that petitioner was clearly afforded constitutionally adequate representation at trial. With respect to petitioner's first allegation of failure on the part of counsel, it was not necessary for counsel to interview State's witness Gulbrantson to determine his testimony. The court had already ruled on the substance of that testimony pursuant to petitioner's motion in limine. Counsel's failure to call Officer Bast to testify and his failure to call petitioner to testify could be characterized as tactical decisions which, at most, might have been errors in judgment. Such errors would not

be sufficient to establish a violation of petitioner's constitutional right.

Finally, counsel's failure to request a jury instruction regarding the testimony of an accomplice does not amount to ineffective representation. The court agrees with respondents that the relation of the witness in question to petitioner and to the police should have been readily apparent to the jury.

Petitioner's remaining allegations of prosecutorial misconduct and error by the trial court amounting to a deprivation of petitioner's Sixth and Fourteenth Amendment rights are not sufficient to constitute reversible constitutional error. "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur

in almost every trial where inadmissible evidence creeps in, usually inadvertently." Bruton v. United States, 391 U.S. 123, 135 (1968).

In the instant case, the remarks made by the Assistant State's Attorney in his opening statement and the single answer given by Detective Gulbrantson outside the scope of the trial court's limiting order are not sufficiently important in the context of the case as a whole to constitute reversible error. With respect to the former statement, the trial court admonished the jury that opening statements are not evidence; with respect to the latter, the jury was instructed to disregard it. Upon consideration of the record as a whole, the court finds that the limiting instructions to the jury were sufficient to protect petitioner's constitutional rights. See Frazier v.

Cupp, 394 U.S. 731, 736 (1969).

Accordingly, it is ordered that respondents' motion for summary judgment be and the same is hereby granted.

E N T E R:

STANLEY J. ROSZKOWSKI, Judge
United States District Court

Dated: March 31, 1980

No. 80-1809

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN P. GUZZARDO,

Petitioner,

vs.

PAUL J. BERGSTON, Sheriff of Winnebago County, Illinois and HONORABLE JOHN W. NIELSEN, Judge, 17th Judicial Circuit, Winnebago County, Illinois,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied his constitutional rights to confrontation and cross-examination of witnesses in his trial in the state court.

2. Whether the Illinois statute under which petitioner was convicted is unconstitutionally vague.

3. Whether petitioner was denied effective assistance of counsel at trial.

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IN THE

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OCTOBER TERM, 1980

JOHN P. GUZZARDO,

Petitioner,

vs.

PAUL J. BERGSTON, Sheriff of Winnebago County, Illinois and HONORABLE JOHN W. NIELSEN, Judge, 17th Judicial Circuit, Winnebago County, Illinois,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents respectfully request that the Petition for Writ of Certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals entered on March 13, 1981, be denied.

I.

STATEMENT OF THE CASE

The statement of the case provided in the petition for writ of certiorari together with the opinion of the Seventh Circuit Court of Appeals and the order of the district court are sufficient to apprise this Court of the facts as they pertain to the issues raised in the petition.

II.

REASONS FOR DENYING THE WRIT

A.

Neither the Isolated, Unresponsive Remark of a State's Witness Nor the Single Comment in the Prosecutor's Opening Statement Was So Prejudicial That It Could Not Be Cured by Limiting Instructions to the Jury.

The general rule is that federal habeas corpus is not a proper proceeding in which to attack errors that are made at a state trial. *Frank* v. *Magnum,* 237 U. S. 309 (1915); *United States ex rel. Bibbs* v. *Twomey,* 506 F. 2d 1220, 1222-23 (7th Cir. 1974), *appeal after remand,* 538 F. 2d 151 (1976), *cert. denied,* 431 U. S. 941 (1977). Unless there is an error of such magnitude as to deny fundamental fairness, federal habeas corpus courts must refrain from putting themselves in the role of reviewing courts. *United States ex rel. Harris* v. *Illinois,* 457 F. 2d 191, 198 (7th Cir. 1972).

As with many issues of Fourteenth Amendment due process, each case must be decided on its unique facts. *United States ex rel. Kirk* v. *Petrelli,* 331 F. Supp. 792, 794-796 (N. D. Ill. 1971), *aff'd,* 492 F. 2d 1245 (7th Cir. 1974). The holdings of the trial court and the Illinois Appellate Court that any error committed was harmless, while not conclusive proof of harmlessness, have probative value towards showing that petitioner was not deprived of his constitutional rights. *Id.* at 795.

Similarly, the district court concluded that, in the context of the case as a whole, Gulbrantson's single statement was unimportant. Opinion at 10. His unresponsive and ambiguous answer to a legitimate and relevant question posed by the prosecutor was of insufficient magnitude to vitiate an otherwise fair trial. *Cf. Schneble* v. *Florida,* 405 U. S. 427 (1972). Whatever prejudice that might have occurred was mitigated by

the court's prompt instruction to the jury to disregard the statement. (TR. 46) An instruction advising the jury to disregard any questions to which objections were sustained was also delivered at the close of testimony. (TR. 135)

The second incident on which the plaintiff relies raises a question of prosecutorial conduct. During his opening statement, the assistant state's attorney, asserted that Linda Wooten would testify that on a prior occasion petitioner had paid her twenty dollars to perform an act of prostitution with another man. Petitioner objected. (TR. 22-30) Without ever ruling on the objection, the trial court instructed the jury that opening statements are not evidence and that the jury must decide whether or not a party had proved all the assertions made during opening arguments. (TR. 30-32) When, during the state's case-in-chief, the prosecutor attempted to elicit from Miss Wooten the information supporting his opening remarks, defense counsel again objected. (TR. 58) The court sustained this objection after counsel argued that the witness' response would be evidence of a prior bad act and was intended to show defendant's propensity to commit the offense charged. (TR. 59-65)

Alleged prejudicial statements by the prosecutor in a state trial are not reviewable in federal court unless they are so inflammatory and so prejudicial as clearly to deprive the accused of a constitutionally fair trial. *United States ex rel. Kirk* v. *Petrelli,* 331 F. Supp. 792, 794-95 (N.D. Ill. 1971), *aff'd,* 492 F. 2d 1245 (7th Cir. 1974). Petitioner must establish that the aggregate effect of the prosecutor's remarks had "a significant impact on the jury's deliberations," *Donnelly* v. *DeChristoforo,* 416 U. S. 637, 646 (1974), and that they "most probably infected the whole decision-making process of the jury," *Bruce* v. *Estelle,* 483 F. 2d 1031, 1040 (5th Cir. 1973).

Opening statements must be evaluated in light of the totality of the circumstances in determining whether the defendant received a constitutionally fair trial. *See Kentucky* v.

Whorton, 441 U. S. 786 (1979). The weight of the evidence, the intent of the prosecutor in making the statement, and the statement's probable impact on the jury are all relevant considerations necessary to a determination of the issue.

Clearly, the prosecutor's comments were not motivated by any improper intentions. At the time of the opening remarks he fully intended to introduce evidence of the prior contact between Wooten and petitioner. The mere fact that the judge subsequently and unforeseeably excluded evidence of the prior contact should not impugn the intent of the prosecutor during his opening statement. The prosecutor could not possibly have known at the time that the trial judge would rule unfavorably on the proffered testimony. *See United States* v. *Akin,* 562 F. 2d 459, 466 (7th Cir. 1977), *cert. denied,* 435 U. S. 933 (1978).

Moreover, the effect that the purported reversible comment had upon the jury could not have been significant. During the course of the prosecutor's opening statement, the court informed the jury that his statement was not evidence. (TR. 30) This admonishment was incorporated into People's Instruction No. 4 and reiterated to the jurors before their deliberations. (TR. 138)

In sum, the Seventh Circuit Court of Appeals and the District Court were correct in finding that any injection of objectionable evidence at petitioner's trial was insubstantial and did not result in a deprivation of any of his constitutional rights, especially when weighed against all the evidence presented and the limiting instructions that were given.

B.

The Illinois Pandering Statute is Not Unconstitutionally Vague as It Provided Petitioner With Clear Notice of the Conduct It Proscribes.

The petitioner complains that the statute under which he was convicted, Section 11-16(a)(2) of the Penal Code of the Illinois Revised Statutes, is unconstitutionally vague on its face and, therefore, deprives him of due process of law. The relevant portion of the statute provides that:

> (a) Any person who performs any of the following acts for money commits pandering;
>
> (1) * * *
>
> (2) Arranges or offers to arrange a situation in which a female may practice prostitution.

Ill. Rev. Stat., ch. 38 § 11-16(a)(2) (1975).

A penal statute is void whenever it is so vague and lacking in ascertainable standards of guilt that it fails to give fair notice to a person of ordinary intelligence that his contemplated conduct is forbidden. *Papachristou* v. *City of Jacksonville,* 405 U. S. 156 (1972); *Palmer* v. *City of Euclid,* 402 U. S. 544 (1971). However, a statute is not automatically invalid as vague simply because of difficulty in determining whether some marginal offenses fall within its language. *United States* v. *Powell,* 423 U. S. 87, 93 (1975); *United States* v. *National Dairy Products Corp.,* 372 U. S. 29, 33 (1963). Additionally, it is well established that vagueness challenges that do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *United States* v. *Mazurie,* 419 U. S. 544, 550 (1975).

The petitioner relies substantially on the specificity requirements of *Smith* v. *Goguen,* 415 U. S. 566 (1974). The Seventh Circuit Court of Appeals in its decision found this reliance

misplaced. The court noted that *Smith* required a greater degree of specificity when First Amendment rights are affected, but specifically held that the Illinois pandering statute does not infringe on the exercise of one's freedom of expression. Thus, all that the statute under scrutiny here need do is provide fair notice to a person of ordinary intelligence that his contemplated conduct is forbidden. The court found that the Illinois pandering statute adequately meets these requirements and that petitioner's vagueness challenge was without merit.

C.

The Seventh Circuit Court of Appeals Correctly Found That Petitioner's Trial Counsel Aggressively and Competently Defended Petitioner.

In complaining of ineffective assistance of counsel, petitioner has taken a scattergun approach. Petitioner lists four mistakes of his trial counsel "based upon a reading of the entire transcript." Pet. Br. 23.

The Seventh Circuit also read the record and found:

> Our reading of the record reveals representation which was certainly adequate. Petitioner's trial counsel aggressively defended his client and provided competent legal representation.

Pet. Br., Seventh Cir. Op. 19.

The court found that the representation provided petitioner at least met the minimum standard of professional representation required by *United States ex rel. Ortiz* v. *Sielaff*, 542 F. 2d 377, 379 (7th Cir. 1976), and found that the points raised by petitioner as evidence of ineffective representation "reflect speculation and hindsight as to how petitioner's defense might have been improved." Pet. Br., Seventh Cir. Op. 17-18.

Petitioner's speculation as to how his defense might better have been presented does not rebut the presumption that his

trial counsel was conscious of his duties to his client and that he sought conscientiously to discharge those duties. *Matthews* v. *United States,* 518 F. 2d 1245 (7th Cir. 1975). Petitioner has failed to carry his burden of demonstrating ineffective representation.

III.

CONCLUSION

For the foregoing reasons the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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